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In The

Supreme Court of the United States

October Term, 1979

No. 79-222

BRUCE E. ELLIS,

Petitioner,

—vs—

AMOS E. REED
Secretary of Corrections and the
Attorney General of the State of North Carolina,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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OPINION BELOW
JURISDICTION
QUESTIONS PRESENTED
LEGAL PROVISIONS
STATEMENT OF THE CASE

Pursuant to Rule 40 of the Rules of the Supreme Court, these items are omitted.

ARGUMENT

THE ISSUE INVOLVED IN THIS CASE LACKS SUFFICIENT IMPORTANCE FOR REVIEW BY THIS COURT, WAS CORRECTLY DECIDED BELOW AND DOES NOT MEET ANY OF THE OTHER CRITERIA THE COURT VIEWS AS DETERMINATIVE OF THE EXERCISE OF ITS CERTIORARI JURISDICTION.

The issue in this case is whether or not the jury was unconstitutionally coerced into a verdict by the trial judge's inquiry into the jury's split during the course of supplemental instructions which were given approximately three hours after deliberation began, but only eight minutes before the verdict following a three-day trial. The facts are generally set out in the Petition's statement at pp 6, 7 and the court opinions below included as appendices (pp i-ii: v-vii). These facts have led each reviewing to conclude the issue against the petitioner and none of the reasons advanced by him in this application dictate a different treatment by this Court.

Petitioner first urges that the Court of Appeals erred in deciding that *Brasfield v. United States*, 272 US 448 71 L Ed 345, 47 S Ct. 135 (1926) was decision based on the court's supervisory power rather than the constitution, arguing that the court's failure to mention the constitution in *Brasfield* was given undue emphasis. In turn, he bases this on two propositions: (a) at the time of *Brasfield*, the court's decisions on the Sixth Amendment were not applicable to the state so that the constitution need not have been mentioned; and (b) the court's other constitutionally based decisions frequently did not reference a particular provision. Neither of these arguments should carry the day. Because the Sixth Amendment was not applicable to the states at the time of *Brasfield* and only the federal judiciary was then affected by it, the supposition would be that *Brasfield* was based only on the court's supervisory power for the reason that there was and is a preference for the avoidance of unnecessary constitutional decisions, *Siler v. Louisville and Nashville R Co.*, 213 US 175, 53 L Ed 753, 29 S Ct. 451, (1909) and a constitutional decision would have been unnecessary here. In light of this, petitioner's first reason should not cause this Court to issue a writ of certiorari.

Petitioner secondly urges that the Court of Appeals' view is in conflict with that of this Court on whether or not the inquiry here was coercive in nature..This is only superficially true for while this Court did state in *Brasfield* that in general the tendency of the inquiry involved here was coercive, it also noted the effect of the inquiry might vary widely from case to case. The facts of *Brasfield*, however, easily dictated the result and the supporting language used there. These facts are set out to some extent in the Circuit Court opinion (8 F2d 472) and show that in addition to the inquiry of the jurors on their split, the trial judge advised the jurors that the case was a very plain one, that it should give them no difficulty, that they should be sure their attitude toward reaching a verdict was based on the evidence; and generally the instructions appeared to reflect a very much heavier handed approach than the norm. None of these additional factors occurred in petitioner' case and therefore while abstractly speaking the effect of the inquiry might be thought to be coercive, its effect in the context of the jury instructions as a whole in this case was properly found not to have that effect. In light of this, petitioner's second reason should not cause this Court to issue a writ of certiorari.

Petitioner finally notes the split of authority between state courts on whether or not *Brasfield* is constitutional in nature. These cases are collected in the district court opinion at pp ix-x of the Petition. However, the split involved here is not such as to undermine the administration of justice throughout the country and therefore should not provide a basis for review. This is because those states which do not permit the inquiry are in step with the supervisory views of this court and therefore no review of the correctness of their decisions is desirable. Conversely, the three federal courts and the remaining states ruling on the question which do not prohibit the inquiry itself, do not permit a conviction to stand where the instructions as a whole are coercive. This is in line with the approach authorized by this Court since the time of *Brasfield* in *Cupp v. Naughten*, 414 US 141 38 L Ed 2d 368, 94 S Ct. 396 (1973) and shows that no injustice exists to be corrected in these jurisdictions by the Court's exercise of its certiorari jurisdiction. In light of this, petitioner's third reason should not cause this Court to issue a writ of certiorari.

CONCLUSION

For the substantive reasons in the opinions of the two courts below and for the reasons above made in response to the Petition itself, the petition for writ of certiorari should be denied.

Respectfully submitted,

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